passengers may be guests of those in charge of the conveyance. Having no control over the management of the conveyance, guests are not imputable with their negligence. Lastly, passengers may, as to some persons in the conveyance, hold the relation of master and servant. Having control over such persons, their negligence is imputable to the passengers. To illustrate: Two young men together hire a carriage and driver, in which to ride, accompanied by two ladies. The ladies are guests, and, except by courtesy, have no control over either young men or driver, whose negligence is therefore not imputable to them. The driver is the servant of the young men. They may control his actions, hence they are responsible for his want of care. The young men are joint enterprisors, and as such, each is responsible for the other's carelessness.

As to officers and employees of public carriers, they appear, from the ablest and preponderating authorities, not to be servants whose negligence is imputable to passengers. As to private carriers, the question appears to be largely one of evidence. If the facts show the relation of joint enterprisors, or of master and servant, then the negligence of a joint enterprisor, or of a servant, is imputable to the other joint enterprisors, or to the master. But the writer inclines to the view that a mere guest is not a master or a joint enterprisor. Surely, a guest ought not to be made responsible for the actions and negligence of those over whom he has no control.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Illinois.

THE WASHINGTON ICE CO. *v.* SHORTALL.

Grants of land bounded on rivers or upon the margins above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the margin. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it, and this title to the middle of the stream includes the water, the bed and all islands.

When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the stream, and he has the right to prevent its removal.

The measure of damages for cutting and removing ice under such circumstances is the value of the ice as soon as it exists as a chattel, that is, as soon as it has been scraped, ploughed, sawed, cut and severed, and is ready for removal.

ACTION of trespass *quare clausum fregit*, brought in the Circuit Court of Cook county, by Shortall, against the Washington Ice Company, for cutting, removing and appropriating, in January and February 1879, a quantity of ice which had formed on the bed of the Calumet river, within the limits of plaintiff's land in Cook county.

Defendant pleaded the general issue and *liberum tenementum*.

On the trial, the patent from the United States to Laframbois

and Decant, was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125 31-100 acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appeared that the call of 125 31-100 acres contained in the patent, required that the bed of the river should be included to make that quantity; that the Calumet river extended from Lake Michigan westward, past the plaintiff's premises, where it is between 165 and 200 feet wide, and is, in fact, a navigable river; that the defendant company owned ice-houses on their own property in the next lot east of plaintiff's; and that in operating on the ice, it did not go on the plaintiff's land save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attached to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel, that is, as soon as it had been scraped, ploughed, sawed, cut and severed and ready for removal.

Defendant excepted to the giving of such instructions, and asked the court to instruct the jury, that a riparian owner on the bank of a river navigable in fact, has no property in the ice formed in the midst of the stream where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same without cause of action or damage to such riparian owner; and that if such access as above stated, had been gained, then at most plaintiff could recover but nominal damages, even if the action of trespass be sustained. This instruction was refused; and defendant excepted.

A verdict and judgment were rendered in favor of plaintiff for $562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this court.

Francis H. Kales, for appellant.

Joseph Wright, for appellee.

The opinion of the court was delivered by

SHELDON, J.—It may be well to inquire first, whether plaintiff, as riparian proprietor of both sides of the Calumet river, is the owner of the bed of the stream within the limits of this land. By the common law only arms of the sea, and streams where the tide ebbs and flows, are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its centre; and the only right the public has therein is an easement for the purpose of navigation. Chancellor KENT, in his commentaries, declared it as settled that grants of land bounded on rivers, or upon the margins above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it: Vol. 3, Com. 427–8. And this title to the middle of the stream includes the water, the bed and all islands: 2 Hilliard Real Prop. 92; Angell on Watercourses, sect. 5.

This rule of the common law has been adopted in this state, and is here the settled doctrine. It was so held in *Middleton* v. *Pritchard*, 3 Scam. 510, and *Houck* v. *Yates*, 82 Ill. 179, with regard to the Mississippi river where it bounds this state. In *Braxon* v. *Bressler*, 64 Ill. 488, as to Rock river; *City of Chicago* v. *Laflin*, 49 Id. 172, and *City of Chicago* v. *McGinn*, 51 Id. 266, in regard to the Chicago river.

The Calumet river, then, being non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land.

It is objected to by defendant that water in a running stream is not the property of any man; that no proprietor has a property in the water itself, but a simple usufruct while it passes along. But

manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

In *Agawam Canal Co.* v. *Edwards*, 36 Conn. 497, it is said: "The principle contained in the maxim, '*cujus est solum, ejus est usque ad cœlum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water; it is a usufruct merely, a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries; and as each has a similar and usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

In *Elliot* v. *Fitchburg Railroad Co.*, 10 Cush. 191, SHAW, C. J., says: "The right to flowing water is now well settled to be a right incident to property in the land; it is a right, *publici juris*, of such character, that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no large appropriation of the water running through it is made, then a just and reasonable use of it cannot be said to be wrongful or injurious to a proprietor lower down. * * * Still, the rule is the same, that each proprietor has a right to the reasonable use of it for his own benefit for domestic use, and for manufacturing and agricultural purposes."

In *Rex* v. *Wharton*, 12 Mod. 510, HOLT, C. J., says: "If a river run contiguously between the land of two persons, each of them is of common right owner of that part of the river which is next his land." Hilliard says, "that a watercourse is regarded in law as a part of the land over which it flows:" 2 Hilliard Real Prop. 150.

It will thus be seen that the riparian owner, as such, has rights with respect to the water in a running stream; he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor

as it passes along his land. The only opposing rights are such rights of the public and such upper and lower proprietors. But when the water becomes congealed and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream, when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor, would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others.

We are of opinion there is such latter right of use, and that it should be held property of which the riparian owner cannot be deprived by a mere wrongdoer. When water has congealed and becomes attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? We do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner. In *McFarlin* v. *Essex Co.*, 10 Cush. 309, SHAW, C. J., remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common-law sense of the term, that is, in all waters above the flow of the tide, the right of fishing is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle thread of the river." "The riparian proprietor has the sole right, unless he has granted it, to fish with nets or seines in connection with his own land:" Ang. on Watercourses, sect. 67. In *Adams* v. *Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide, have an exclusive right of fishing opposite to their land to the middle of the river, and that the public have an easement in the river as a highway for passing and repassing with every kind of water craft. So seaweed

thrown upon the shore belongs to the owner of the soil upon which it is cast: *Eman* v. *Turnbull*, 2 Johns. R. 313.

The exclusive right in the owner to take the ice formed over the land is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned and may, with like propriety, be recognised. It is connected with, and in the nature of, an accession to the land, being an increment arising from formations over it, and belonging to the land properly, as being included in it, in its indefinite extent upwards. Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it quite an important business. It would not be in the interest of peace and good order, nor consist with legal policy, that such an article should be held a thing of common right and be left the subject of general scramble, leading to acts of force and violence. In reference to the rule which we here adopt, of assigning to the owner of the bed of a stream property in the ice which forms over it, we may well use as fitly applying to it the language of HOSMER, J., in *Adams* v. *Pease*, *supra*, in speaking of the common-law rule as to the right of fishing, viz.: "The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner." In accordance with these views, we hold, as it was held in *State* v. *Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream, running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, and he has the right to prevent its removal. See, further, relative to the subject, *Myer* v. *Whitaker*, 55 How. Pr. Rep. 376; *Lorman* v. *Benson*, 8 Mich. 18; *Mill River Woollen Manf. Co.* v. *Smith*, 34 Conn. 462; *Brown* v. *Bowen*, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxon* v. *Bressler*, above cited, "where the river is navigable, the public have an easement, or a right of passage upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement." The same is said as to the ice here.

But it was not removed as necessary for the enjoyment of the public easement of navigation,—it was for the purpose only of the appropriation of it for defendant's gain.

As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this court in those cases: *Ill. & St. L. Railroad Co.* v. *Ogle*, 92 Ill. 353; *McLean Coal Co.* v. *Lennon*, 91 Id. 61; *Ill. & St. L. Railroad Co.* v. *Ogle*, 82 Id. 627; *McLean Coal Co.* v. *Land*, 81 Id. 359; *Robertson* v. *Jones*, 71 Ill. 405. Perceiving no error in the giving or refusing of instructions by the Circuit Court, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

By the common law, the limit of exclusive private ownership on waters where the tide ebbed and flowed was high water mark; and, except as modified by statute or custom, such appears to be the rule in the United States. See Cooley on Torts 321, and cases cited. As to rivers above the ebb and flow of the tide, but navigable in fact, such as the Mississippi and other large rivers, there is some difference of opinion. By the common law, the title of the riparian owner on a stream above tide-water *prima facie* extended to the centre of the stream; and this rule has been held in this country to apply to such rivers as the Detroit, the Delaware, the Connecticut, the Mississippi, the Milwaukee, the Sault St. Marie, the Saginaw, the Sandusky, the Chicago, Rock River, and many others: *Lorman* v. *Benson*, 8 Mich. 18; *Rundle* v. *Delaware, &c., Canal Co.*, 1 Wall., Jr., 294; *Hart* v. *Hill*, 1 Whart. 124; *Adams* v. *Pease*, 2 Conn. 481; *Morgan* v. *Reading*, 11 Miss. 366; *Magnolia* v. *Marshall*, 39 Id. 110; *Schurmeier* v. *St. Paul, &c., Railroad Co.*, 10 Minn. 82; *Houck* v. *Yates*, 82 Ill. 179; *Arnold* v. *Elmore*, 16 Wis. 509; *Ryan* v. *Brown*, 18 Mich. 196; *Bay City Gaslight Co.* v. *Industrial Works*, 28 Id. 182; *Gavit* v. *Chamaers*, 3 Ohio 496; *Chicago* v. *Laflin*, 49 Ill. 172; *Braxon* v. *Bressler*, 64 Id. 488.

On the other hand, in Iowa, North Carolina, Missouri, Pennsylvania, and perhaps in other states, it has been held that the soil under rivers navigable in fact, though not subject to the ebb and flow of the tide, does not belong to the riparian owner, but to the state: *McManus* v. *Carmichael*, 3 Iowa 1; *Tomlin* v. *Dubuque, &c., Railroad Co.*, 32 Id. 106; *Houghton* v. *Chicago, &c., Railway Co.*, 47 Id. 370; *Musser* v. *Hershey*, 42 Id. 356; *State* v. *Glen*, 7 Jones (Law) 321; *Wilson* v. *Forbes*, 2 Dev. 30; *Benson* v. *Morrow*, 61 Mo. 345; *Hickey* v. *Hazard*, 3 Mo. App. 480; *Shrunk* v. *Schuylkill Nav. Co.*, 14 S. & R. 71; *Carson* v. *Blazer*, 2 Binn. 475. The same rule has also been laid down by the Supreme Court of the United States: *Barney* v. *Keokuk*, 94 U. S. 324; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272.

In those states where the title of the riparian owner extends to the centre of the stream, in running out the side lines of his property, they are to be extended from their respective *termini* on the shore, at right angles with the general course of the river, to the centre of the stream, unless otherwise established by the terms of the grant or conveyance under which

he holds: *Knight* v. *Wilder*, 2 Cush. 198; *Clark* v. *Campau*, 19 Mich. 325. And the boundary-lines of water lots fronting on a river in such a manner that their side lines strike the shore at a right angle with the middle thread of the stream, but at a different angle with the shore at that point, extend into the river at a right angle with the thread of the stream, without reference to the shape of the shore: *Bay City Gaslight Co.* v. *Industrial Works*, 28 Mich. 182.

Where the common-law rule prevails, the right of the owner to the land under the water is subject only to the public easement of navigation and the right of improvement for that purpose; and he may make any beneficial use of his right that the nature of the property will admit without injuring the rights of the public. Thus, in *Lorman* v. *Benson*, 8 Mich. 18, it was held that the right to raft logs down the Detroit river did not involve the right of booming them upon private property for safe keeping and storage; and that, the owner of the bank being entitled to every beneficial use of the soil under the river which could be exercised with a due regard to the public easement, such obstruction which prevented his taking ice gave him a right of action in trespass for the damages thereby occasioned.

So, as held in *The State* v. *Pottmeyer*, 30 Ind. 287; s. c., 33 Id. 402, and in the principal case, it follows, as a legitimate consequence of the rule, that the ice upon the surface of the stream constitutes a part of the land, and may be taken exclusively by the riparian owner. See, also, *Cummings* v. *Barrett*, 10 Cush. 186. The owner of the fee of land adjoining a canal has also been held entitled to take ice therefrom, if the taking does not interfere with navigation or the use of the water for hydraulic purposes: *Edgerton* v. *Huff*, 26 Ind. 36. In *Mill River Woollen Manufacturing Co.* v. *Smith*, 34 Conn. 462, and *Myer* v. *Whitaker*, 55 How. Pr. 376, the owner of water in a mill-pond was held entitled to the ice as against the owner of the land. In both of these cases, however, the plaintiffs *owned* the water of the ponds, having acquired by contract the exclusive and absolute right to use the same as against the owner of the land or those claiming under him, and the cases are to be distinguished by this fact from those above cited.

In Missouri, where it is held that the soil under rivers navigable in fact does not belong to the riparian proprietor, it was held that a person who had surveyed, marked and staked off ice upon the Mississippi river, unappropriated by another, and who had expended money to preserve it and make it valuable for use as a commercial commodity, had a possession sufficient to support an action of trespass against one who with force and arms drove him and his servants away, and took and carried away the ice: *Hickey* v. *Hazard*, 3 Mo. App. 480. See, also, *Hittinger* v. *Eames*, 121 Mass. 539. And, doubtless, in that and other states where the rights of the riparian proprietor do not extend to the ownership of the soil under the water, the doctrine of the principal case will have no application; but where the common-law rule as to non-navigable rivers has been adopted, the rule of the principal case will doubtless prevail.

MARSHALL D. EWELL.

Chicago.